BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY

UNITED STATES - IMPORT MEASURES ON CERTAIN PRODUCTS FROM THE EUROPEAN COMMUNITIES

(AB-2000-9)

APPELLANT SUBMISSION OF THE UNITED STATES

September 27, 2000

Table of Contents

I. INTRODUCTION AND ALLEGATIONS OF ERROR

1. On September 12, 2000, the European Communities ("the EC") appealed the findings of the Panel report on *United States – Import Measures on Certain Products from the European Communities*[1/] (hereinafter "Panel Report"). Pursuant to Rule 22(1) of the Working Procedures for Appellate Review, the United States will respond as Appellee to the EC's arguments on October 9, 2000. In this submission, pursuant to Rule 23(1), the United States seeks review of four other discrete issues of law covered in the Panel Report and legal interpretations developed by the Panel. Although there are numerous aspects of the Panel Report that are troubling or with which the United States has concerns, the United States is limiting its appeal to these four items in an attempt to focus on those errors of greatest systemic concern.

2. On March 3, 1999, the United States announced that it would change customs bonding requirements on certain products from EC countries to preserve its ability to suspend tariff concessions upon DSB authorization in the WTO dispute on *EC – Bananas*.[2/] That authorization came on April 19, 1999,[3/] following completion on April 6, 2000 of the work of the arbitral panel considering the proposed U.S. level of suspension.[4/] The arbitrator's work had originally been scheduled to conclude on March 2, 1999, as provided for in Article 22.6 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"). The change in bonding requirements was instituted on March 4, the day following the March 3 announcement.[5/] For

---

1/ Panel Report on *United States – Import Measures on Certain Products from the European Communities*, WT/DS165/R, 17 July 2000 ("Panel Report").

2/ Appellate Body Report on *European Communities – Regime for the Importation, Sale and Distribution of Bananas* ("*EC - Bananas*"), adopted on 25 September 1997, WT/DS27/AB/R; Panel Reports on *EC - Bananas*, modified by the Appellate Body, and adopted on 25 September 1997, WT/DS27/R/ECU, WT/DS27/R/GTM, WT/DS27/R/HND, WT/DS27/R/MEX, and WT/DS27/R/USA.

3/ WT/DSB/M/59.

4/ Arbitration under Article 22.6 of the DSU in *European Communities – Regime for the Importation, Sale and Distribution of Bananas (Article 22.6 Arbitration)*, WT/DS27/ARB, paras. 2.10 - 2.13, Parts III, IV and VI (April 6, 1999)

5/ *See* Panel Report, para. 2.24.

convenience, we will in this submission follow the Panel's convention of referring to this change in bonding requirements as "the 3 March Measure."

3. In this proceeding, the United States first appeals from the Panel's finding that the 3 March Measure was inconsistent with Article II.1(a) and (b), first sentence, of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") based on examination of the Measure together with "the right it aims to guarantee."[6/] A measure is, in its own right, either consistent or inconsistent with a WTO provision, and a panel may not attribute to that measure any inconsistency it may conclude exists with respect to another measure. Second, the United States appeals the Panel's finding that the 3 March Measure was inconsistent with DSU Article 23.2(a).[7/] The EC never requested this finding, never argued for this finding, and never so much as referenced Article 23.2(a) in connection with any alleged U.S. violation of that provision in this dispute. The EC thus failed to meet its burden in establishing a violation of this provision, and the Panel's finding notwithstanding this fact constitutes an impermissible assumption by the Panel of the EC's burden on its behalf. In addition, the Panel's Article 23.2(a) finding is incorrect because it is based on the erroneous conclusion that a "determination" within the meaning of that provision may be implied from other actions. Second, the United States appeals the Panel's finding on DSU Article 3.7,[8/] not only because the EC did not argue for this finding, but also because the relevant portion of this provision contains no obligation which a Member might breach. Finally, the United States appeals the Panel's finding that the 3 March Measure was inconsistent with DSU Article 21.5.[9/] The Panel's Article 21.5 finding fails because it was based on the Panel's erroneous Article 23.2(a) finding.

6/ *Id.*, paras. 6.43, 6.59, 7.1(c)

7/ *Id.*, paras. 6.107, 7.1(b).

8/ *Id.*, paras. 6.87, 7.1(d).

9/ *Id.*, paras. 6.107, 7.1(b).

II. ARGUMENTS REGARDING SPECIFIC ISSUES UNDER APPEAL

A. *By Basing its Analysis on the "Right it was Aimed to Guarantee," Rather than on the Measure Itself, the Panel Erred in Finding that the 3 March Measure was Inconsistent with GATT 1994 Article II.1(a) and (b).*

4. The Panel stated that the 3 March Measure was "a decision to increase bonding requirements to secure the collection of up to 100% duties" on certain imports from EC countries.[10/] In examining these increased bonding requirements for their consistency with the U.S. obligations found in GATT 1994 Article II, the Panel examined both the increased costs associated with such bonds, as well as "the increased bonding requirements as such, in relation to the tariffs they are supposed to guarantee."[11/] The United States is appealing the Panel's finding that the "increased bonding requirements as such," are inconsistent with GATT 1994 Articles II.1(a) and II.1(b), first sentence.[12/]

5. The Panel's error is inherent in its conclusion that the WTO compatibility of bonding requirements "should be assessed together with the rights or obligations they aim at securing."[13/] According to the Panel, the right in question in this dispute was the right to collect customs duties. Since, according to the Panel, the bonding requirements were intended to secure duties in excess of bound rates, the bonding requirements were inconsistent with GATT Article II.1(a) and (b), first sentence.[14/] The Panel thus made its finding based not on the conclusion that the bonding requirements themselves breached the obligations in question, but because the duties they might be called upon to enforce (if imposed) would breach those obligations.

6. This "guilt by association" approach is inconsistent with the Panel's responsibility to analyze a measure's WTO compatibility based on the measure itself, and not to attribute to that

---

10/ Panel Report, para. 6.39.

11/ *Id.*, para. 6.42.

12/ *Id.*, paras. 6.59, 6.72.

13/ *Id.*, para. 6.56.

14/ *Id.*, paras. 6.56-6.59.

measure the effects or breaches of another measure. Article II.1(a) requires each Member to provide treatment no less favorable than that provided for in its tariff Schedule.[15/] Article II.1(b), first sentence, exempts products listed in a Member's Schedule from "ordinary customs duties in excess of those set forth and provided therein," while the second sentence exempts such products from "other duties or charges."[16/] The additional bonding requirements in this dispute did not themselves impose additional duties even if, as the Panel concluded, they imposed additional costs, and the Panel did not find otherwise. It concluded that the bonding requirements "enforced," "guaranteed collection of" or "secured" duties in excess of bound rates, not that these requirements "imposed" or "collected" such duties.[17/] Its findings with respect to Article II.1(a) and (b), first sentence, were based strictly on the fact that the bonding requirements might ultimately assist in enforcing duties that would, if collected at certain levels, breach the provisions in question.

7. The weakness of the Panel's reasoning is reflected not only on its face, but in the decision of one Panelist not to join it.[18/] Rather than collapsing the analysis of an enforcement measure with the measure it is enforcing, that Panelist correctly recognized that the enforcement measure must, in its own right, be examined for inconsistency with a Member's obligations. Only then

---

[15/] GATT 1994, Art. II.1(a) provides:

> (a) Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.

[16/] GATT 1994, Art. II.1(b) provides:

> (b) The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date.

[17/] *E.g.*, Panel Report, para. 6.58.

[18/] *Id.*, paras. 6.60-6.61.

might an examination of the measure it is enforcing become relevant. This Panelist also correctly identified GATT 1994 Article XX(d) as the context in which such an examination would occur. That provision excuses measures which might otherwise breach an obligation if the measures are

> necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, *including those relating to customs enforcement*, . . .[19/]

8. Article XX(d) thus explicitly addresses the need to secure compliance with customs measures, and provides for a *separate* examination of the consistency of the measure enforced, in connection with a responding party's attempt to justify an enforcement measure which might be in breach of *another provision*. A panel would not reach Article XX(d) unless it had found such a breach, yet the Panel's analysis skips this step. The Panel's approach inverts the analysis, rendering Article XX(d) superfluous and without effect.[20/] Under the Panel's approach, panels would never reach Article XX(d) because they would only need to examine the consistency of the measure enforced. They would attribute to the enforcement measure any breach found – and, presumably, exonerate the enforcement measure without further analysis if no breach is found.

9. The Panel cites the GATT Panel in *United States – Section 337*[21/] for the conclusion that its approach to the interpretation of enforcement measures is correct. In fact, the *Section 337* Panel's findings – and the EC arguments in that dispute – lead to precisely the opposite conclusion. The parties to that dispute agreed that Section 337 was a measure to secure compliance with the substantive patent law of the United States, and that the substantive patent law was not inconsistent with U.S. obligations; they differed, however, over whether Section 337,

---

[19/] GATT 1994, Article XX(d). The chapeau to Article XX also makes clear that measures falling within this exception must "not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade."

[20/] *See* Appellate Body Report on *United States – Standards for Reformulated and Conventional Gasoline*, adopted on 20 May 1996, WT/DS2/AB/R, p.23, n.10 ("an interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility").

[21/] GATT Panel Report on *United States – Section 337 of the Tariff Act of 1930,* adopted on 7 November 1989, BISD 36S/345.

as a procedural law, was covered by Article III:4, or only by Article XX(d).[22/] In response to the U.S. argument that Section 337 was only covered by Article XX(d), the EC argued, "Article XX(d) provides for an exception to be considered only after conduct inconsistent with another provision of the General Agreement has been established."[23/] The Panel agreed:

> Article XX(d) applies only to measures inconsistent with another provision of the General Agreement, and that, consequently, the application of Section 337 has to be examined first in the light of Article III:4.[24/]

10. The Panel in this dispute quotes the *Section 337* Panel as stating, "enforcement procedures cannot be separated from the substantive provisions they serve to enforce,"[25/] but ignores the context of the statement and the nature of the *Section 337* Panel's analysis which followed. That context was the U.S. argument that Section 337, as a procedural enforcement measure, was not subject to GATT 1947 Article III:4, even if the substantive patent law it was enforcing was subject to this provision. The *Section 337* Panel's statement merely reflects its conclusion that both procedural and substantive laws had to be subject to Article III:4, otherwise "contracting parties could escape the national treatment standard by enforcing substantive law, itself meeting the national treatment standard, through procedures less favorable to imported products than to like products of national origin."[26/]

11. This quotation from the *Section 337* Panel report highlights one of the fundamental flaws of the conclusion in the Panel Report on the 3 March Measure that the WTO-consistency of an enforcement measure is to be judged based on the WTO-consistency of the measure enforced: if the measure enforced were WTO-consistent, this would excuse breaches by the enforcement measure that a separate analysis would reveal. The *Section 337* Panel did not resolve the dispute

---

22/ *Id.*, para. 5.8

23/ *Id.*

24/ *Id.*, para. 5.9.

25/ Panel Report, para. 6.45, *quoting Section 337*, para. 5.10.

26/ *Section 337*,para. 5.10.

before it by examining substantive U.S. patent law for its consistency with Article III:4 – the parties did not even question this. Rather, the Panel examined whether Section 337, the measure at issue, provided imported products less favorable treatment than that accorded under the substantive patent law applicable to U.S. domestic products. Examining the treatment of imports under Section 337 against the treatment afforded domestic products under substantive U.S. patent law, the *Section 337* Panel concluded that Section 337 did provide less favorable treatment in contravention of Article III:4, and only then undertook a separate Article XX(d) analysis.[27/] The citation to *Section 337* by the Panel examining the 3 March Measure thus undermines, rather than supports, its analytical approach.

12. The Panel also cites two other GATT panel reports, *EEC – Animal Feed Proteins*[28/] and *EEC – Minimum Import Prices*,[29/] each from 1978, in support of its approach of examining the WTO-consistency of an enforcement measure based on that of the measure enforced.[30/] These reports either do not support the Panel's position, or else provide no reasoning to support that position.

13. The analysis in the *Minimum Import Prices* report hardly provides compelling, if any, support for the conclusion that breaches found for another measure may be attributed to the measure enforcing it. First, the *Minimum Import Prices* Panel separately analyzed the interest charges and costs associated with each of the two sureties themselves to determine whether they were inconsistent with Articles VIII:1(a) and II:1(b).[31/] Second, the Panel likewise examined the forfeiture provisions relating to these sureties to determine whether they were "other charges" within the meaning of Articles VIII:1 and II:1(b). The *Minimum Import Prices* Panel reached a

---

[27/] *See id.*, paras. 5.20, 5.22.

[28/] GATT Panel Report on *EEC – Measures on Animal Feed Proteins* ("*Animal Feed Proteins*"), adopted on 14 March 1978, BISD 25S/49.

[29/] GATT Panel Report on *EEC – Programme of Minimum Import Prices, Licenses and Surety Deposits for Certain Processed Fruits and Vegetables* ("*MIPs*"), adopted on 18 October 1978, BISD 25S/68.

[30/] Panel Report, para. 6.44.

[31/] *MIPs*, paras. 4.2, 4.6, 4.15, 4.17.

split decision, with one panelist concluding that one such forfeiture provision was an "other charge," and the majority concluding that neither such provision was an "other charge." The majority concluded that because the forfeiture provisions were penalties enforcing obligations in an import certificate, they were not charges "imposed on or in connexion with an importation."[32/] The majority did not attribute to the forfeiture provisions a breach associated with the import certificate, nor did they excuse any such breach because the measure enforced was found consistent with the relevant provision. Moreover, the lone panelist who considered the one forfeiture provision an "other charge" concluded that there was a breach of Article II:1(b) based on the forfeiture provision itself, not because of a breach by another measure.

14. Finally, the *Minimum Import Prices* Panel found, with the exception of one member, a breach with respect to GATT 1947 Article XI, based on the operation of the system as a whole, including the forfeiture provision. The issue of whether individual elements of the system breached this provision, and whether the breach of one element might be attributed to another, was never at issue because the EC, as defending party, insisted that the system as a whole *was* subject to Article XI (and thus not other GATT 1947 provisions) but was excused under Article XI:2(c)(i) and Article XI:1.[33/] Thus, while the *Minimum Import Prices* Panel did involve an examination of a surety together with the measures it was enforcing, this treatment was not litigated. The *Minimum Import Prices* Panel report should not be read to support the conclusion that a breach by a measure may be attributed to the measures enforcing it.

15. Finally, with respect to *Animal Feed Proteins,* that Panel's conclusion that the surety at issue should be examined together the purchase obligation it was enforcing was based on a cursory, one-paragraph analysis not apparently grounded in any way on the text of the GATT 1947.[34/] The *Animal Feed Proteins* Panel provides no persuasive reasoning in support of its

---

[32/] *Id.*, paras. 4.7, 4.16.

[33/] *Id.*, paras. 3.3, 4.9.

[34/] *Animal Feed Proteins*, para. 4.4.

conclusion, and the Panel in this dispute should not have followed it.

16. Panels may not attribute to one measure any breach that might exist for another. The Panel examining the 3 March Measure did so in connection with its findings on Article II:1(a) and (b), first sentence, and these findings should therefore be reversed.

B. *The Panel Erred in Finding that the 3 March Measure Was Inconsistent with DSU Article 23.2(a).*

17. The Panel erred in finding that the 3 March Measure was inconsistent with DSU Article 23.2(a), both because the EC never requested or argued for these findings, and thus failed to meet its burden of establishing a violation of this provision, and because the Panel based its finding on the erroneous conclusion that "determinations" under Article 23.2(a) may be inferred from other actions.

1. The Panel Improperly Relieved the EC of its Burden of Establishing a Violation of Article 23.2(a).

a. The EC Never Cited Article 23.2(a) or Presented Arguments that the 3 March Measure was Inconsistent with Article 23.2(a)

18. The burden of proof in WTO dispute settlement proceedings is now well-established. As the Appellate Body explained in *EC -- Hormones:* "The initial burden lies on the complaining party, which must establish a *prima facie* case of inconsistency with a particular provision of the [relevant agreement] on the part of the defending party, or more precisely, of its . . . measure or measures complained about. When that *prima facie* case is made, the burden of proof moves to the defending party, which must in turn counter or refute the claimed inconsistency".[35/] In

---

35/ Appellate Body Report on *EC – Measures Affecting Meat and Meat Products (Hormones)*, adopted on 13 February 1998, WT/DS26/AB/R, para. 98 ("*EC – Hormones*"). *See, also*, Appellate Body Report on *United States -- Measures Affecting Imports of Woven Wool Shirts and Blouses from India ("Shirts and Blouses")*, adopted on 23 May 1997, WT/DS33/AB/R, at 14 ("a party claiming a violation of a provision of the WTO Agreement by another Member must assert and prove its claim"); and Appellate Body Report on *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, adopted on 16 January 1998, WT/DS50/AB/R, para. 74 (noting that the Panel had "properly requir[ed] the [complaining party] to establish a *prima facie* case" before

establishing its *prima facie* case, the complaining party must present "evidence and argument sufficient to establish a presumption" of inconsistency.[36/] The panel's task is to examine and weigh all evidence on the record and decide whether the complaining party, as the party bearing the original burden of proof, has convinced the panel of the validity of its claims.[37/]

19. It is equally well-established that a panel errs when it relieves the complaining party of its burden and assumes that burden on its behalf. The Appellate Body in the *Japan Varietal Testing* dispute made clear that panel findings must be based on a specific request by a party for a finding.[38/] In that dispute, the Panel found that Japan's quarantine measure was inconsistent with Article 5.6 of the *Agreement on the Application of Sanitary and Phytosanitary Measures*, because a significantly less trade restrictive alternative measure meeting the requirements of that provision was available.[39/] The United States had, in the context of its discussion of Article 5.6, argued for a different alternative measure than that considered by the Panel, but had in another context referred to the alternative measure ultimately considered by the Panel.[40/] However, the United States never explicitly argued that the existence of the alternative measure considered by the Panel created a breach of Article 5.6. The Appellate Body considered that this failure to argue that the alternative measure met the elements of Article 5.6 precluded the Panel from making Article 5.6 findings with respect to this measure.[41/] The Appellate Body stated that the

---

proceeding to the next step of its evaluation of the claim at issue).

[36/] *Shirts and Blouses,* WT/DS33/AB/R at 14.

[37/] Appellate Body Report on *Japan – Certain Measures Affecting Agricultural Products* ("*Japan Varietals*"), adopted 19 March 1999, WT/DS76/AB/R, para. 127.

[38/] *See* Appellate Body Report on *Japan Varietals*, WT/DS76/AB/R, paras. 125-131 (reversing the Panel where it made findings notwithstanding the failure of the United States to establish or argue its *prima facie* case).

[39/] Panel Report on *Japan Varietals*, adopted 19 March 1999, WT/DS76/R, paras. 8.72, 8.91-8.104.

[40/] *See id.*, para. 4.133. In addition, at paragraph 38 of its first oral statement, the United States stated: "Fundamentally, if Japan truly believed its own speculation -- that CxT is the relevant indicator of efficacy -- they would insist upon tests that only measure CxT and do not even include pests and their relevant mortality levels." United States Oral Statement at First Panel Meeting, *Japan Varietals*, para. 38 (second to last point). This was the alternative ultimately considered by the Panel in its Article 5.6 analysis.

[41/] *See* WT/DS76/AB/R, paras. 125-131. In *Canada Aircraft, the Appellate Body* explained, "The panel in Japan -- Agricultural Products had simply and erroneously relieved the complaining Member of the task of showing the inconsistency of the responding Member's measure with Article 5.6 of the SPS Agreement."

significant investigative authority available to a panel:

> cannot be used by a panel to rule in favour of a complaining party which has not established a *prima facie* case of inconsistency *based on specific legal claims asserted by it*. A panel is entitled to seek information and advice from experts and from any other relevant source it chooses . . . to help it to understand and evaluate the evidence submitted and the arguments made by the parties, but *not to make the case for a complaining party*.[42/]

20. The EC's failure to make the specific legal claim that the 3 March Measure was inconsistent with Article 23.2(a) similarly precluded Panel findings in this dispute with respect to this provision. As the United States pointed out in its request for interim review,[43/] the EC at no point in its statements or submissions ever requested the Panel to make a finding with respect to Article 23.2(a). The EC's panel request alleged a violation of "Article 23," without greater specificity, and the EC in its first written submission was nearly as vague in its argumentation. In a one-and-a-half-page section entitled, "The violation of Article 23 and Article 3 of the DSU," the EC referred to "Article 23; paragraphs 1 and 2, of the DSU", but never once identified the specific subparagraph or paragraphs of Article 23.2 for which it was alleging a violation, let alone set forth any argumentation on how the U.S. measure breached the obligations set forth in subparagraph (a) of that provision.[44/]

Appellate Body Report on *Canada - Measures Affecting the Export of Civilian Aircraft*, adopted 20 August 1999, WT/DS70/AB/R, para. 194.

[42/] Appellate Body Report on *Japan Varietals*, para. 129 (emphasis added). *See, also,* Appellate Body Report on *United States – Tax Treatment for "Foreign Sales Corporations"* ("*FSC*"), adopted on 20 March 2000, WT/DS108/AB/R, para. 101 (Appellate Body found that U.S. "did not assert, far less argue," that the measure at issue was a measure "to avoid double taxation of foreign-source income" under SCM Agreement footnote 59, notwithstanding a U.S. statement in its first written submission that, "the FSC is designed to prevent double taxation of export income earned outside the United States," because the statement was not specifically made in support of a footnote 59 argument).

[43/] Request of the United States for Review of the Interim Report ("U.S. March 27 Submission"), paras. 3-4 (March 27, 2000); Further Comments of the United States regarding the Interim Report Following the EC's 29 April 2000 Comments ("U.S. April 4 Submission"), paras. 3-9 (April 4, 2000).

[44/] First Written Submission of the European Communities, paras. 18-22 (Panel Report, Appendix 1.1). The EC in that section also quoted a passage from the panel report in *United States – Sections 301-310 of the Tariff Act of 1930* dealing with the meaning of Article 23.1, which also referenced paragraphs (b) and (c) of Article 23.2. However, the EC never attempted to connect this passage to any allegation of how the 3 March Measure was inconsistent with any of those provisions. *Id.*, para. 21. In a footnote, the passage from the *Section 301* report makes a cursory reference to Article 23.2(a), for the purpose of explaining that Article 23.1deals with more than

21. The United States pointed out in its first written submission that the EC had not identified the specific Article 23 violation it was alleging, effectively inviting the EC to identify the provision at issue.[45/] In response to this invitation, the EC in its first oral statement and second written submission only asserted a violation of DSU Articles 23.1 and 23.2(c).[46/] No mention was made of a violation of Article 23.2(a), either in the text of the EC's arguments or in the headings under which these arguments appeared.[47/] Throughout its submissions, the EC argued and presented a case with respect to Article 23.2(c),[48/] but never at any time argued that the terms of Article 23.2(a) were not met.[49/] Even after the United States pointed out the absence of EC argumentation on Article 23.2(a) in its comments on the interim report, the EC did not identify where it made this argument.[50/] The EC did not so much as attempt to fulfill its burden of establishing a violation of Article 23.2(a), nor is it even clear that it wished to. Nevertheless, the Panel undertook an extended analysis of Article 23.2(a) and concluded that the 3 March Measure was inconsistent with that provision. In so doing, the Panel, "simply and erroneously relieved the

---

this provision.

45/ First Submission of the United States of America ("U.S. First Submission"), para. 46 (December 6, 1999) (Panel Report, Appendix 2.1).

46/ Oral statement of the European Communities at the First Substantive meeting with the Panel ("EC First Oral Statement"), para. 14 (16 December 1999) (Panel Report, Appendix 1.2); Second Written Submission of the European Communities ("EC Second Submission"), paras. 34-40. (21 January 2000) (Panel Report, Appendix 1.5).

47/ In the EC Second Submission, the EC made arguments relating to DSU Articles 22.6 and 23.2(c) under the subheading, "Under no circumstances is a WTO Member allowed to adopt and/or implement suspension of concessions or other obligations against another Member before the completion of an on-going arbitration procedure and its authorisation by the DSB." *See* EC Second Submission, App. 1.5, paras. 34-40. This subheading was the only one that included a discussion of an alleged violation of Article 23.2, and itself appeared under the general heading, "The violation of the Procedural requirements under Articles 22 and 23 of the DSU." *Id.*

48/ *See, e.g.*, EC First Oral Statement, App. 1.2, para. 14; EC Second Submission, App. 1.5, paras. 34-40.

49/ The EC quotes and refers to Article 23.2(a) at paragraphs 42 and 86 of its Second Written Submission, but only in the context of its arguments with respect to Article 22.6 and to the alleged existence of a presumption of good faith. Beyond the arguments themselves, the headings of the sections in which these arguments appear ("In any case, Article 22.6 does not warrant the WTO-compatibility of the adoption of a suspension of concessions or other obligations in presence of procedural deficiencies," "The Presumption of Good Faith") make this clear.

50/ *See* EC Comments of March 29 on U.S. Comments on the Interim Report. The EC's passing references to Article 23.2(a) which it cites in this letter are discussed in the following subsection of this submission.

complaining Member of the task of showing the inconsistency of the responding Member's measure" with the WTO provision at issue.[51/]

b. The Panel's Explanations of Where the EC Asserted its Claim Confirm that the Claim was Never Made.

22. In paragraph 5.8 of the Interim Review section of its report, the Panel responded to the United States' comment that the EC had failed to meet its burden by referring to: (1) the EC's references in its panel request and first submission section heading to "Article 23", and its reference in its first submission to "Article 23, paragraphs 1 and 2"; (2) the EC's reference in paragraph 5 of its first written submission to three U.S. Federal Register notices and its statement, "This proposed action was based on the unilateral determination by the United States that 'the measures the EC has undertaken to apply as of January 1, 1999 fail to implement the WTO recommendations concerning the EC banana regime'."[52/]; and (3) the EC's statement in paragraph 86 of its second written submission, "Article 23.1 and 23.2(a) of the DSU specify that such a finding (which in the terminology of Article 23 is called a 'determination') can only be made under the rules and procedures of the DSU."[53/]

23. In addition, in paragraphs 5.9-5.14 of the interim review section of the Panel Report, the Panel further attempted to justify its finding on Article 23.2(a). For example, in paragraph 5.10, the Panel explained, "the main claim of the European Communities is that on 3 March 1999 the United States acted unilaterally, contrary to the fundamental obligation of Article 23 of the DSU," and in paragraph 5.11, indicated its view that a claim concerning Article 23.2(a) may be made merely by presenting arguments with respect to Article 23.1: "For us . . . the prohibition against unilateral determination is contained in the first paragraph of Article 23 and the European Communities has clearly made claims under Article 23 paragraphs 1 and 2." The Panel also

---

[51/] Appellate Body Report on *Canada - Measures Affecting the Export of Civilian Aircraft*, adopted 20 August 1999, WT/DS70/AB/R, para. 194 (explaining the Appellate Body's findings in *Japan Varietals*).

[52/] EC Second Submission, App. 1.5, para. 5.

[53/] *Id.*, para. 86.

references EC citations to "official statements" of USTR "which provide clear evidence of the nature of the EC claims."[54/]

24. The Panel's references to EC statements and its attempt to justify its Article 23.2(a) finding only reinforce the complete absence of any EC request or argumentation relating to Article 23.2(a), and the fact that the Panel undertook to make the EC's case on Article 23.2(a) on its own initiative.

(i) The EC's References to "Article 23".

25. As discussed above, the EC's references in the panel request and its first written submission to "Article 23" and "Article 23, paragraphs 1 and 2" provide no guidance as to which subparagraph of Article 23.2 the EC claim related. The EC explicitly responded to the U.S. point that these references were impermissibly vague by clarifying in its first oral statement and subsequent submissions and statements that the 3 March Measure violated Article 23.1 and Article 23.2(c) – without any argument that the 3 March Measure violated Article 23.2(a).[55/] The EC prefaced this clarification by deriding the United States for its "difficulties with the identification of the rules contained in Article 23 of the DSU to which the EC refers in the present dispute,"[56/] yet it is clear that the Panel also had these difficulties, even after the EC clarified which provisions it was referring to.

26. The Panel appears to have accepted the EC's argument in its comments on the U.S. Request for Interim Review that, "The EC never excluded Article 23.2(a) from its claims."[57/] The EC thus suggested that it could meet its burden of argumentation merely by referring to WTO

54/ Panel Report, para. 5.12.

55/ Moreover, as discussed below, the EC's reference to Article 23 in its panel request arguably failed to meet even the rudimentary notice requirements of DSU Article 6.2. Yet the Panel considered such a reference adequate to inform the United States that the EC claim related to Article 23.2(a), and to meet the EC's burden of establishing a violation of that provision.

56/ EC First Oral Statement, App. 1.2, paras. 14-15.

57/ EC Comments of March 29 on U.S. Comments on the Interim Report, page 2 (emphasis in original).

Agreement provisions containing numerous subparagraphs, without specifying any particular sub-paragraphs or specifically identifying how the measure in question is inconsistent with the obligations found in those subparagraphs. Were the EC's position accepted, the burden in a dispute would be reversed. By merely referring to a WTO article, it would be incumbent on a defending party to offer arguments as to why it is not violating every paragraph of that article – even in the absence of arguments by the complaining party. Moreover, it would be incumbent on panels to address each of these paragraphs in its report. Thus, just as the EC "never excluded" subparagraph (c) of paragraph 2 of Article 23, it also "never excluded" subparagraph (b). Should the United States (and the Panel) therefore have addressed possible violations of this subparagraph as well? Likewise, in a WTO dispute involving, for example, GATT 1994 Article III, may a complaining party force a responding party and the panel to address each and every one of the paragraphs of this article merely by referring to the article as a whole? This would not be consistent with placing the burden of proof on the complaining party to a dispute.

27. In fact, the Appellate Body has addressed the situation in which a complaining party refers to an article containing multiple obligations without specifying the particular obligation to which its claim relates. In *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products,* the Appellate Body examined for its consistency with DSU Article 6.2 an EC panel request in which the EC listed articles in the Safeguards Agreement containing multiple obligations. The Appellate Body noted that "[i]dentification of the treaty provisions claimed to have been violated by the respondent is always necessary both for purposes of defining the terms of reference of a panel and for informing the respondent and the third parties of the claims made by the complainant; such identification is a minimum prerequisite if the legal basis of the complainant's claim is to be presented at all."[58/]

28. The Appellate Body went on to note that there would be circumstances where the "simple

---

58/ Appellate Body Report on *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products ("Korea Dairy"),* adopted on 12 January 2000, WT/DS98/AB/R, para. 127.

listing of the articles of the agreement or agreements involved" would be sufficient to meet the standard of *clarity* in the legal basis of the complaint, and there would be situations when such a listing would *not* satisfy the standard of Article 6.2, "for instance, where the articles listed establish not one single, distinct obligation, but rather multiple obligations. In such a situation, the listing of articles of an agreement, in and of itself, may fall short of the standard of Article 6.2."[59/] The Appellate Body then found that this issue must be examined on a case-by-case basis, taking into account "whether the ability of the respondent to defend itself was prejudiced, given the actual course of the panel proceedings, by the fact that the panel request simply listed the provisions claimed to have been violated."[60/]

29. The Appellate Body determined that the EC panel request in *Korea Dairy* – which like that in this dispute listed articles containing multiple obligations – should have been more detailed. The Appellate Body denied Korea's appeal solely because Korea failed to demonstrate to the Appellate Body that the mere listing of the articles had prejudiced its ability to defend itself in the course of the panel proceedings. While Korea had asserted it had sustained prejudice, Korea had not offered any supporting particulars.[61/] As discussed below, the United States in this dispute was prejudiced by the EC's vague description of its claim in its panel request.

30. Article 23, and in particular Article 23.2, contains multiple, distinct obligations. Article 23.2(a) relates to the conditions under which a Member may make determinations that a WTO violation has occurred, that WTO benefits have been nullified or impaired, or that the attainment of a WTO objective has been impeded, while Article 23.2(c) sets forth obligations concerning the steps that must be taken before suspending concessions. The United States in the proceeding below did not assert that the EC's panel request failed to meet the requirements of DSU Article 6.2, largely because it had considered that the EC's clarification at the first panel meeting that its

---

[59/] *Id.*, para. 124.

[60/] *Id.*, para. 127.

[61/] *Id.*, para. 131.

claim related to subparagraph (c) of Article 23.2 was sufficient to avoid prejudice with respect to that claim. However, that very clarification greatly prejudiced the United States with respect to Article 23.2(a), leading the United States to believe that the EC was not making a claim with respect to that provision.

31. The record shows that, from the first meeting of the Panel onward, the EC quoted and made specific arguments with respect to the obligations found in Article 23.2(c), and that the United States responded to these arguments. The record also shows, through its silence, that the EC never, at any time in the panel proceeding, made a similar claim with respect to Article 23.2(a), and the United States accordingly made no arguments on this topic. In light of the EC's specific identification of Article 23.2(c) and its failure even once to assert a claim that the 3 March Measure was inconsistent with Article 23.2(a), the United States could not reasonably have expected to discover in the interim report that the Panel had chosen to make findings on Article 23.2(a). While the simple fact that the EC never made a claim under Article 23.2(a) is sufficient for the Appellate Body to reverse the Panel's finding because the Panel relieved the EC of its burden in this dispute, the Appellate Body also should conclude that the Panel's findings on Article 23.2(a) should be rejected because of the inadequacy of the EC's panel request, and the prejudice to the United States which resulted.

(ii) The EC's Reference to U.S. Federal Register Notices and its Statement that U.S. Action was Based on a Unilateral Determination.

32. Also in paragraph 5.8 of the Panel Report, the Panel asserts that the EC made a claim with respect to Article 23.2(a) through its references to three U.S. Federal Register notices and its statement that, "This proposed action was based on the unilateral determination by the United States that 'the measures the EC has undertaken to apply as of January 1, 1999 fail to implement the WTO recommendations concerning the EC banana regime'."[62/] There was no basis for the

---

62/ EC First Submission, App. 1.1, para. 5.

Panel to conclude that any of this information constituted an EC claim under Article 23.2(a). Paragraph 5 of the EC first written submission, where these references appear, falls within section 2 of the EC submission, entitled "The Facts at Issue."[63/] The EC's legal claims – which, again, did not include Article 23.2(a) – were provided in the following section, which was entitled, "The Violation of US WTO Obligations."[64/] The Panel appears to be suggesting that it was authorized to identify all possible WTO violations it might find in the factual record before it, regardless of whether specifically argued by the EC. However, as the Appellate Body noted in *Japan Varietals*, a panel may examine whatever facts it wishes, "but *not to make the case for a complaining party*."[65/] Unlike Article 23.2(c), the EC never even quoted or cited the text of Article 23.2(a), let alone tried to link the specific obligation in that provision to the 3 March Measure.

(iii) The EC's Statement Concerning Articles 23.1 and 23.2(a).

33. In paragraph 5.8 of its report, the Panel also cites the EC's statement in paragraph 86 of its second written submission as evidence that the EC made an Article 23.2(a) claim. The EC stated, "Article 23.1 and 23.2(a) of the DSU specify that such a finding (which in the terminology of Article 23 is called a 'determination') can only be made under the rules and procedures of the DSU."[66/] However, as explained in the U.S. comments on the interim report,[67/] this reference to Article 23.2(a) appears in the context of the EC's argument that there is a "presumption of good faith" – of compatibility with WTO obligations – when a WTO panel examines a Member's compliance with DSB rulings and recommendations. Nowhere in this section does the EC attempt to link the 3 March Measure to an obligation in Article 23.2(a), or even to the issue of presumptions. The section involves an abstract discussion of such presumptions, and the EC's

---

63/ *Id.*, para. 2.

64/ *Id.*, para. 13.

65/ Appellate Body Report on *Japan Varietals*, para. 129 (emphasis added).

66/ Panel Report, para. 5.8, *quoting* EC Second Submission, App. 1.5, para. 86.

67/ *See* March 27 Submission, note 6; April 4 Submission, note 3.

citation to Article 23.2(a) is intended to serve as context to support its position.[68/] If such a passing reference in a contextual argument can be found to create a claim, then parties to a dispute run the risk of a panel's making a complaining party's case with respect to claims it did not even intend to make – as appears to have occurred here. The mere appearance of such a reference would oblige a responding party to provide a full defense of potential arguments not even asserted by the complaining party. This, too, would render the complaining parties' burden meaningless, and would create both an unfair and unmanageable burden on defending parties. It would also undermine one of the central objectives of DSU Article 6.2 – providing notice to parties and third parties of the claims asserted.

(iv) The Panel's other justifications for reaching Article 23.2(a)

34. The Panel's other justifications for reaching Article 23.2(a) succeed only in reinforcing that the Panel took it upon itself to make the EC's case. The Panel's statement in paragraph 5.10 of the Panel Report that the EC's "main claim" is that "the United States acted unilaterally, contrary to the fundamental obligation of Article 23 of the DSU" illustrates the Panel's loose and easily met definition of "claim." The various obligations in Article 23 are distilled down to one label which does not even appear in the text of Article 23, "unilateral," and the Panel appears to have considered the EC to have made a claim under all paragraphs and subparagraphs of Article 23 based on its frequent use of this term, notwithstanding the EC's clear focus on the U.S. *action* of March 3, and not on any "determination." This level of "clarity" would fall short of the DSU Article 6.2 requirements for a *panel request* which the Appellate Body set forth in *Korea Dairy*, let alone prove sufficient to make or establish a claim meeting the EC's burden with respect to Article 23.2(a).

[68/] The EC's only other reference to Article 23.2(a) comes in paragraph 42 of its second written submission. As with its reference in paragraph 86, this reference comes in the context of another EC claim, in this case, relating to Article 22.6. The section in which this reference appears is entitled, "In any case, Article 22.6 does not warrant the WTO-compatibility of the adoption of a suspension of concessions or other obligations in presence of procedural deficiencies," EC Second Submission, App. 1.5, para. 41, and, in the conclusion to this section, the EC states, "In the EC's view, there can be no doubt that the US measure has breached the provisions of Article 22 of the DSU." *Id.*, para. 56. No claim is made with respect to Article 23.2(a).

35. At paragraphs 5.10-5.12 of its report, the Panel also discusses the relevance of the EC's Article 23.1 claim to the Panel's conclusion that the EC had made a claim with respect to Article 23.2(a). The Panel explains in paragraph 5.10 that more specific violations of the DSU are but examples of violations of Article 23.1. The Panel then in paragraph 5.11 states: "For us . . . the prohibition against unilateral determination is contained in the *first paragraph* of Article 23 and the European Communities has clearly made claims under Article 23 paragraphs 1 and 2."[69/] In other words, a claim concerning Article 23.2(a) may be made merely by presenting arguments with respect to Article 23.1.

36. This formula would deny defending parties virtually any notice of the claims being made against them. The WTO Agreement includes many examples of provisions which require, in general terms, that Members also comply with other, not specifically identified, WTO obligations. The most notable example is Article XVI:4 of the WTO Agreement, which provides that each Member shall ensure the conformity of its laws, regulations and administrative procedures with "its obligations as provided in the annexed Agreements."[70/] Under the Panel's reasoning, if a complaining party merely cited Article XVI:4, a panel would be free to scour the factual record for violations of any obligation found in an annexed Agreement, regardless of whether the complaining party had ever made a specific claim with regard to that obligation or agreement. Panels do not have such free rein. They are limited in the scope of their findings by their terms of reference, the claims pursued by the complaining party and the defenses asserted by the responding party. The mere fact that an argument has been made under Article 23.1 cannot mean that a claim has been made under Article 23.2(a), let alone that a Panel may itself meet a party's burden in establishing a violation of that provision.[71/]

[69/] Panel Report, para. 5.11 (emphasis added).

[70/] *Marrakesh Agreement Establishing the World Trade Organization*, Art. XVI:4.

[71/] The *Argentina Footwear* dispute provides an informative contrast. In that dispute, the EC's panel request cited Article 4 of the *Safeguards Agreement*, and the Panel ultimately made a finding with respect to Article 4.2(c), a provision which makes explicit reference to a specific obligation in Article 3. The EC explicitly made arguments regarding Article 3 in order to establish the Article 4.2(c) breach. However, the Panel did not make a separate

37. Finally, the Panel in paragraph 5.12 notes that the EC in its first oral statement and its rebuttals referred to various official statements from USTR which provide "clear of evidence of the nature of the EC claims."[72/] The content of these statements is immaterial to the question of whether the EC was making a claim under Article 23.2(a). As discussed further in the following section: (1) these statements do not constitute "determinations" within the meaning of Article 23.2(a); (2) the statements were not – as the EC acknowledged – themselves measures; and (3) a determination may not be inferred from these statements, or from the 3 March Measure. Even if these statements constituted perfect evidence of a determination, they would not be sufficient to establish a claim of an Article 23.2(a) violation. For that, the EC would at least have had to cite the relevant obligation in that provision and explain how the 3 March Measure was inconsistent with that obligation.

38. The EC did not so much as refer to Article 23.2(a) outside of the passing references described above,[73/] let alone provide such argumentation. In *Japan Varietals*, the United States did refer to the alternative measure ultimately considered by the Panel as establishing a breach of SPS Agreement Article 5.6, but not in the context of its Article 5.6 argument.[74/] The Appellate Body concluded that this was not sufficient to meet the U.S. burden in that dispute. Likewise, mere references to statements, notices or the term "unilateral," outside of the context of specific argumentation concerning an allegation of an Article 23.2(a) breach, cannot meet the EC's burden in this dispute. In the *Shirts and Blouses* dispute, the Appellate Body stated, "we find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition

---

finding regarding Article 3. *See* Appellate Body report on *Argentina – Safeguard Measures on Imports of Footwear*, adopted on 12 January 2000, WT/DS121/AB/R, paras. 71-75. Here, while the Panel concluded that a violation of Article 23.2(a) establishes a violation of Article 23.1, the EC never argued that there was an Article 23.2(a) violation, and yet the Panel both examined that question and issued a finding.

[72/] Panel Report, para. 5.12.

[73/] *See* above, paras. 25, 33 and note 68.

[74/] *See* above, para. 19. See also the discussion of the *FSC* dispute at note 42.

that the mere assertion of a claim might amount to proof."[75/] Here, the EC did not even so much as assert a claim with respect to Article 23.2(a), let alone provide evidence or argumentation to prove that claim. The Panel erred in making a finding on Article 23.2(a), and it should be reversed.

2. The Panel Erred in Concluding that a "Determination" Within the Meaning of Article 23.2(a) may be Inferred from other Actions of a Member, and that the 3 March Measure Implied Such a Determination.

39. Even were the Appellate Body to conclude that the Panel did not err in examining whether the 3 March Measure was consistent with DSU Article 23.2(a), its Article 23.2(a) finding should be reversed because the Panel relied on the erroneous conclusion that "determinations" within the meaning of Article 23.2(a) may be inferred from other actions.

40. Article 23.2(a) provides that in the cases described in Article 23.1, Members shall,

> (a) not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this understanding;

41. The 3 March Measure before the Panel, which it ostensibly analyzed for compliance with Article 23.2(a), was defined in the EC's panel request as:

> the US decision, effective as of 3 March 1999, to withhold liquidation on imports from the EC of a list of products, together valued at $520 million on an annual basis, and to impose a contingent liability for 100% duties on each individual importation of affected products as of this date (annex 1). This measure includes administrative provisions that foresee, among other things,

---

[75/] Appellate Body Report on *Shirts and Blouses*, at 14.

the posting of a bond to cover the full potential liability.[76/]

42. This description of the measure in question does not refer to a U.S. determination or decision that the EC had violated its WTO obligations, and the Panel's analysis reflects this fact. Rather than identifying any U.S. action that constituted such a determination, the Panel inferred a determination from the 3 March Measure. According to the Panel, the 3 March Measure "*implies necessarily* a prior U.S. unilateral determination that the EC implementing measure was inconsistent with the WTO."[77/]

43. The Panel cited in support of this conclusion "various statements, declarations and other internal memos of USTR and the US Customs Service confirm[ing] the context of the 3 March Measure, as a measure whereby the United States was seeking the redress of what it unilaterally determined to be a WTO violation."[78/] The Panel did not indicate that these statements themselves constituted a "determination"; indeed, the EC had explicitly acknowledged that they were not even measures, let alone part of the 3 March Measure.[79/] Even with respect to its analysis of these statements and documents, however, the Panel does no more than cite them to "confirm[]"[80/] a determination it never identifies. According to the Panel, the mere resort to Article 22 by the United States in January 1999 indicates that the United States "*had to have* reached an internal decision that the EC implementing measure was WTO inconsistent."[81/] The Panel also relied on a statement in a press release regarding a U.S. "right,"[82/] as evidence that such a right "*could only have been determined* unilaterally by the United States, contrary to Article

---

76/ WT/DS165/8.

77/ Panel Report, para. 6.100 (emphasis added).

78/ *Id.*, para. 5.13.

79/ Panel Report, para. 5.6; EC Comments of March 29 on U.S. Comments on the Interim Report, pages 3-4 ("Thus, the public statements, comments or other which the Panel has analyzed constitute evidence of the nature of the 3 March Measure but are not a measure themselves.").

80/ *Id.*, paras. 5.13, 6.102.

81/ *Id.*, para. 514 (emphasis supplied).

82/ The USTR press release refers to "protecting our rights." USTR Press Release of March 3, 1999 (EC Annex VII), at 2

23.2(a),"[83] despite the fact that a press release has no legal standing in the United States, and the fact that the statement was made in the context of other statements clearly indicating that the United States intended to act in accordance with the arbitrator's award, and that any such rights would flow from the arbitral proceeding.[84]

44. Thus, not only the EC's panel request, but also the Panel Report itself, fails to identify any U.S. government decision on the WTO-conformity of the EC's measure which constitutes a "determination." Moreover, the Panel is also quite simply wrong that "determinations" within the meaning of Article 23.2(a) may be inferred from other actions.

45. Neither Article 23.2(a) nor the DSU define the term "determination." In interpreting the term "determination," the Panel referred to the dictionary definition of determination as, "The action of coming to a decision; the result of this; a fixed intention. The action of definitely . . . establishing the nature of something . . . exact ascertainment."[85] The Panel went on, without further explanation, "In the context of the WTO, we consider that a 'determination' that a WTO violation has occurred is a decision that a WTO Member has violated the WTO Agreement and which bears consequences in WTO trade relations."[86]

46. From its reasoning, it is clear that the Panel believed that such a "decision" need not itself be an identifiable (and identified) government act. So long as such a "decision" may be inferred from another government act, such as resorting to WTO dispute settlement procedures, or apparently, from a mere statement by a government official lacking any legal significance, that

---

[83] Panel Report, para. 6.104 (emphasis supplied).

[84] *See id.* ("The United States will refrain from collecting higher duties until the release of the arbitrators' final decision. When the arbitration is complete, the U.S. will assess 100% duties on selected products imported as of March 3rd as necessary to offset the harm to U.S. interests *as determined by the arbitrators.*"; "The United States will assess duties on selected products *in accordance with the arbitrators' final decision.*" (Emphasis supplied.))

[85] Panel Report, para. 6.98 (quoting the New Shorter Oxford English Dictionary).

[86] *Id.*, para. 6.98.

implied "decision" is subject to the requirements of Article 23.2(a) and may be the subject of dispute settlement proceedings. This conclusion is not supported by the ordinary meaning of the term "determination," the context provided by the final clause of Article 23.2(a) and other DSU provisions and the object and purpose of Article 23.2(a).

47. Inasmuch as the EC did not make a claim regarding Article 23.2(a), the Panel did not have the benefit of argumentation from the parties on what constitutes a "determination." The United States would, for example, have quoted more extensively than did the Panel in this dispute the dictionary definition of "determination":

> "The settlement of a suit or controversy by the authoritative decision of a judge or arbiter; a settlement or decision so made, an authoritative opinion"; "The settlement of a question by reasoning or argument"; "The action of coming to a decision; the result of this; a fixed intention"; "The action of definitely locating, identifying, or establishing the nature of something; exact ascertainment (of); a fact established, a conclusion or solution reached".[87/]

48. This definition thus emphasizes not only the finality of a decision, it also emphasizes its formality. A determination is made by a "judge," an "arbiter"; it is an "authoritative opinion." The EC has itself emphasized its view that a determination would have an element of formality.[88/] The EC has concluded, "These explanations of the term 'determination' are unequivocally turning around the idea of a formal and definitive decision with legal consequences made in the framework of a formal proceeding."[89/] The United States agrees that, to be a "determination," such a decision would have to be formal, that is, made explicitly, as a result of a domestic legal process, with some legal status. Indeed, were it to lack any legal status, it is questionable whether

---

[87/] The New Shorter Oxford English Dictionary, at 651 (1993).

[88/] *See* Panel Report on *United States – Sections 301-310 of the Trade Act of 1974* ("*Section 301*"), adopted on 27 January 2000, WT/DS152/R, para. 4.834. For the reasons described at paragraphs 4.871 - 4.874 of the *Section 301* Panel report, the United States disagrees with the EC's conclusion that "legal consequences" must flow from a decision to constitute a determination.

[89/] *Id.*

it would even qualify as a "measure" for purposes of the DSU.[90/]

49. Beyond this, if, as the Panel concluded, a determination may be implied, rather than explicitly reached, without any connection to domestic legal proceedings and without any legal status, the potential pool of circumscribed actions would be absurdly large. Indeed, the minutes of meetings of the DSB and other WTO committees would provide a fertile source for new dispute settlement proceedings based on Article 23.2(a), as would a perusal of the daily press.[91/] Determinations could be "implied" not only from the press statements cited by the Panel, but also from those frequently made by senior EC officials with respect to U.S. measures ranging from Section 301 to FSC.[92/] Indeed, a quick review of the statements of Members's public officials would almost certainly produce a large pool of comments "implying a determination." There is no indication that Members intended so dramatically to limit their ability to express opinions as would be the case if such expressions could "imply" determinations within the meaning of Article 23.2(a).

50. This same reasoning results in the conclusion that, in order to constitute a "determination," a formal decision on the WTO-consistency of another Member's measure must be disclosed by that Member outside its government. In agreeing to Article 23.2(a), Members cannot have intended to limit their own ability to draw conclusions concerning other Member's measures in the context of internal deliberations or decision-making processes. Members could

---

[90/] *See, e.g.*, DSU Arts. 4.4, 6.2, 19.1.

[91/] *See, e.g.*, WT/DSB/M/79, para. 3 ("Korea regretted that the United States had not complied with the DSB's recomendations and rulings"); WT/DSB/M/87, para. 2 ("In Canada's view, the U.S. measures were unjustified and were inconsistent with the WTO obligations."); WT/DSB/M/76, para. 31 (The representative of Japan stated, "The U.S. actions were inconsistent with the WTO Agreement . . .").

[92/] *See, e.g.*, "U.S. threatens tariffs on European Luxury items", *The Associated Press*, 22 December 1998, PM cycle (in which Sir Leon Brittan states, with respect to Section 301: "It is time to take action against the pernicious and *unlawful* effect of this wholly unilateral legislation". (emphasis added)); "European Commission Says Congress Proposal on Foreign Sales Corporations (FSC) is Incompatible With WTO Rules," *Bulletin Quotidien Europe*, No. 7790, 2 September 2000 ("Pascal Lamy has informed the United States administration that, according to the Commission, the proposal for modification of the tax scheme known as "Foreign Sales Corporations", . . . is not compatible with the rules of the World Trade Organization (WTO).").

not have intended to reach the "thoughts" of governments, be they the thoughts of government officials or of the governments themselves (in the sense that they are not disclosed). Without such deliberations or decision-making, a Member could never exercise its right to challenge another Member's measure under the DSU. An "implied" determination is unlikely to have been disclosed; otherwise, there would be little need to imply it.

51. Likewise, the requirement of finality implicit in the dictionary definition of "determination"[93/] argues against the conclusion that a determination can be "implied." When the terms of a "determination" can not be known, but only implied, it is impossible to know whether they are firm or final.

52. All of these considerations from the ordinary meaning of the term "determination" – that a "determination" within the meaning of Article 23.2(a) is to be formal, final and not internal to the government – force a conclusion that a determination may not be implied.

53. The context of Article 23.2(a) also supports this conclusion. The final clause of Article 23.2(a) provides that, in order for a Member's determination to be consistent with Article 23.2(a), the Member "shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding." This language presupposes that there is an adopted panel or Appellate Body report, or an arbitration award, before the determination is made. Given this fact, if determinations may be inferred even from a Member's decision to resort to dispute settlement, the absurd conclusion which must be drawn is that that decision is itself WTO inconsistent. Such a reading is not tenable. Members obviously must be able to draw conclusions regarding the WTO-consistency of another Member's measures in order to exercise their WTO rights. Indeed, the object and purpose of Article 23 – to ensure that Members resort to WTO dispute settlement rules when they consider their agreement rights to have been violated – would be frustrated if

---

93/ *See* Panel Report, para. 6.98.

even the decision to pursue WTO dispute settlement were considered a determination for the purpose of Article 23.2(a). While the Panel suggests that such an "internal" determination that is "made in the context of a DSU procedure [is] obviously not in violation of Article 23,"[94/] this conclusion cannot be squared with the last clause of Article 23.2(a), if the Panel's broad definition of "determination" were accepted.

54. Other DSU provisions support this view. For example, several DSU provisions, such as Articles 3.3, 4.1, 4.7, 5.4 and 10.4, lay out the steps a party may take to assert its WTO rights when it believes these rights have been denied. Again, it is axiomatic that Members invoking dispute settlement procedures are doing so based on a belief that their rights have been denied. The DSU reflects this concept through use of the term "considers." For example, Article 3.3 provides that "prompt settlement of situations in which a Member considers that any benefits accruing to it . . . are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members." Likewise, Article 10.4 provides that a third party to a dispute may have recourse to normal dispute settlement procedures if it "considers that a measure already the subject of a panel proceeding nullifies or impairs benefits accruing to it under any covered agreement." The DSU's use of the term "considers" makes clear that no formal determination is involved. To imply such a determination from such a decision or belief would, again, undermine the ability of a Member to exercise its rights under these DSU provisions. Moreover, the DSU's use of the term "considers," meaning "look upon as," "think or take to be," or "be of the opinion that,"[95/] also reinforces the conclusion that Article 23.2(a) is not intended to reach the "thoughts" of governments, that the beliefs of Members, in the sense of conclusions drawn in internal deliberations, and not disclosed formally, are not circumscribed by Article 23.2(a) – even if these beliefs are reflected in and can be understood from governmental actions or the statements of governmental actors.

[94/] *Id.*, para. 6.99 (referring to the U.S. "internal" determination that led it to request Article 22 authorization to suspend concessions).

[95/] *The New Shorter Oxford English Dictionary,* p.485 (1993).

55. In conclusion, the Panel's finding that government actions may imply a "determination" for purposes of Article 23.2(a), as well as its finding in this dispute that the U.S. decision to increase bonding requirements implied such a determination, are incorrect, and should be reversed on that basis, as well as on the basis that the EC never made a claim on this point or met its burden of establishing a violation.

C. *The Panel Erred in Finding that the 3 March Measure was Inconsistent with DSU Article 3.7.*

56. Like its finding on Article 23.2(a), the Panel erred in finding that the 3 March Measure was inconsistent with DSU Article 3.7 because the EC never requested or argued for this finding. In addition, the Panel erred because the portion of Article 3.7 cited by the Panel contains no obligation, but is only directory in nature. The EC in its response to U.S. comments on the interim report did not even contest the U.S. position on these points.[96/]

1. The Panel Improperly Relieved the EC of its Burden of Establishing a Violation of DSU Article 3.7.

57. As was the case with Article 23.2(a), the Panel acted contrary to the Appellate Body's finding in *Japan Varietals* that panels may not "make the case for a complaining party."[97/] In its Panel request, the EC referred to DSU Article 3, without specifying any of the several paragraphs found in this article. The first suggestion came in the EC's first written submission, where, in a single paragraph at the end of a section entitled "The Violation of Article 23 and 3," the EC stated that the 3 March Measure

> undermines the achievement of the fundamental objectives under Article 3 of the DSU. Article 3 of the DSU describes the dispute settlement system of the DSU as 'a central element in providing security and predictability to the multilateral trading system'. As the Appellate Body has indicated . . . the objective of the 'security and predictability of the multilateral trading

---

96/ *See* EC Comments of March 29 on U.S. Comments on the Interim Report.

97/ Appellate Body Report on *Japan Varietals*, para. 129.

> system' is also an object and purpose of the substantive WTO Agreements themselves.[98/]

58. This statement makes no reference to Article 3.7, but only to "the objective" of security and predictability, which can be found in DSU Article 3.2. The EC in this paragraph makes no attempt to explain how the 3 March Measure is in violation of any obligation found in Article 3.7, and in fact identifies no obligation whatsoever, but only an "objective." The EC made no mention whatsoever of Article 3 in its oral statement at the first panel meeting.

59. In its response to Panel question 4 following the first panel meeting, the EC first refers to Article 3.7, in the context of denying that the legal status of an implementing measure "could be influenced or determined by the status of a measure . . . withdrawn in accordance with Article 3.7 of the DSU and the recommendations and rulings of the DSB."[99/] No effort is made to link the 3 March Measure to this article.

60. Similarly, in the EC second written submission, the EC makes three references to Article 3.7, none in connection with an argument that the 3 March Measure is inconsistent with an obligation found in Article 3.7. The first reference is in the EC's argument with regard to Article 22.6, in which it describes the fact that withdrawal of a measure is listed as an option under Article 3.7.[100/] The EC refers to this discussion as "legal context."[101/] The second reference is in the EC's discussion of Article 21.5, in which the EC refers to "the effects that are reserved to adopted panel or Appellate Body reports in accordance with Articles 3.7, 16, 19 and 23 of the DSU."[102/] The third reference to Article 3.7 comes in the context of the EC's argument concerning a "presumption of good faith," in which the EC cites the "guiding principle" found in

---

98/ EC First Submission, App. 1.1, para. 22 (emphasis added).

99/ Replies of the European Communities to the questions from the Panel and the United States, at 2 (13 January 2000) (Panel Report, Appendix 1.4).

100/ EC Second Submission, App. 1.5, paras. 46, 48.

101/ *Id.*, para. 51.

102/ *Id.*, para. 74.

the fourth sentence of Article 3.7 in arguing for such a presumption. None of these references constitute an argument that the 3 March Measure violates Article 3.7. The only reference to a violation of "Article 3" is in the conclusion, in the conclusory statement that the 3 March Measure is "inconsistent with Articles 3, 21, 22 and 23 of the DSU."[103/] The only reference to Article 3 in the EC's oral statement at the second panel meeting was equally cursory.[104/]

61. Thus, the EC's allegations of a violation of Article 3 were never more than afterthoughts, and were never made with respect to a particular paragraph or obligation in Article 3. The Panel's conclusion that the 3 March Measure was inconsistent with Article 3.7 was made in the absence of any attempt by the EC to establish such a finding, and impermissibly relieved the EC of its burden of making its case. The EC, in its response to the U.S. comments on the interim report, never contested these facts. Finally, the EC's panel request referred only to "Article 3," which contains multiple paragraphs, without identifying the specific obligation in question. In addition to reversing the Panel's Article 3.7 finding because the Panel relieved the EC of its burden in this dispute, the Appellate Body should reverse this finding based on the inadequacy of the EC's panel request, and the prejudice to the United States which resulted.

2. Article 3.7, Last Sentence, Does Not Set Forth an Obligation.

62. Even had the EC argued that the 3 March Measure was inconsistent with Article 3.7, it is not clear how it would have made this demonstration, since the last sentence of Article 3.7 contains no obligation which might be breached. Apart from its opening sentence requiring that, "[b]efore bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful," this provision lists the alternative outcomes in a dispute (mutually acceptable solution, withdrawal of measure, compensation, suspending concessions) and indicates whether such outcomes are "clearly to be preferred," the ususal "first objective," "resorted to only if the immediate withdrawal is impracticable," or "the last resort." While this provision offers

---

[103/] *Id.*, para. 89.

[104/] EC Second Oral Statement, App. 1.8, at 9.

guidance to Members on how they should approach the decision to initiate dispute settlement proceedings and on the preferences for outcomes, it does not by its terms require any given outcome. In particular, the last sentence of Article 3.7 is merely descriptive, providing that suspension of concessions, subject to DSB authorization, is a "a last resort."[105/] The sentence does not contain an obligation, in the sense of providing that a Member "shall" or "shall not", undertake any action.

63. Nevertheless, the Panel concluded that since the 3 March Measure constituted a "suspension of concessions or other obligations within the meaning of Article[] . . . 3.7 last sentence," it was inconsistent with Article 3.7.[106/] There was no further analysis of Article 3.7, beyond the statement at the outset of the Panel's discussion that, "Articles 23.2(c), 22.6 and 3.7 of the DSU prohibit any unilateral suspension of GATT/WTO concessions or obligations, without a DSB authorization."[107/] Inasmuch as Article 3.7 does not set forth a specific obligation with regard to the suspension of concessions, but only guidance that suspension is "a last resort," the Panel erred in finding that the 3 March Measure was inconsistent with this provision. The Appellate Body should reverse the Panel's Article 3.7 finding on this basis as well.

D. ***The Panel's Finding With Respect to Article 21.5 Fails Because it Relies on Arguments not Made by the EC and on its Improper Finding With Respect to Article 23.2(a).***

64. The Appellate Body should reverse the Panel's finding that the 3 March Measure is inconsistent with Article 21.5 because this finding is based on argumentation not presented by the EC and on the Panel's erroneous conclusion that the 3 March Measure is inconsistent with DSU Article 23.2(a).

105/ Indeed, in its Appellant Submission, the EC itself states that Article 3.7 "describes" as a "last resort" the suspension of concessions. Appellant Submission of the European Communities, para. 45 (22 September 2000).

106/ Panel Report, para. 6.87.

107/ *Id.*, para. 6.35.

65. The basis for the EC's claim with respect to Article 21.5 was that the United States did not have in hand an Article 21.5 panel report before requesting DSU Article 22 procedures.[108/] The Panel correctly rejected this argument, and, having done so, should not have reached a finding based on reasoning it developed on behalf of the EC. A similar conclusion was drawn by Appellate Body in *Japan Varietals* in reversing that panel's finding on SPS Agreement Article 5.6. That panel had first rejected the arguments of the United States with respect to this provision, then proceeded to make a finding based on arguments not explicitly presented by the United States.[109/] The Panel's finding on Article 21.5 should likewise be reversed because it is not based on EC argumentation.

66. This finding should also be reversed because it relies on the Panel's erroneous Article 23.2(a) finding. In its report, the Panel concluded that the first sentence of Article 21.5(a) "contains a substantive obligation similar to that of Article 23.2(a)."[110/] According to the Panel, this sentence prohibits "unilateral determinations of WTO violations," and this prohibition "is comparable to that of Article 23.2(a) of the DSU."[111/] While this language suggests that the Panel did not necessarily consider the two obligations identical, the Panel went on to state that,

> the first sentence of Article 21.5 is simply a more specific provision reiterating, in the specific context of implementing measures, the general prohibition against unilateral determinations of WTO violations contained in Articles 23.1 and 23.2(a) of the DSU.[112/]

[108/] *See* Panel Report, 6.116; EC Second Submission, App. 1.5, paras. 19-29, 57-82. In the EC's brief argument on Article 21.5 in its first written submission, the EC makes a cursory assertion that the U.S. made a "unilateral determination," EC First Submission, App. 1.1, para. 28, and in its first oral statement, the EC similarly makes a bald assertion that the "measures taken by the United States" in this dispute were taken in violation of U.S. procedural obligations under Article 21.5. EC First Oral Statement, App. 1.2, para. 22. These mere assertions fall short of the substantive argumentation necessary to meet the EC's burden of establishing how the United States breached Article 21.5. *See* Appellate Body Report on *Shirts and Blouses*, at 14; Appellate Body Report on *FSC*, para. 101. In any event, these arguments were largely made and forgotten by the EC in the its attempt to base its Article 21.5 claim on the relationship between Articles 21.5 and 22.

[109/] *See* Appellate Body Report on *Japan Varietals*, paras. 125-131.

[110/] *Id.*, para. 6.92.

[111/] *Id.*

[112/] *Id.*, para. 6.93.

Based on this conclusion, the Panel did not undertake any analysis separate from that under Article 23.2(a) in finding a violation of Article 21.5.[113/] It simply quoted the language of Article 23.2(a), stated that this provision prohibits "unilateral determinations" and that the 3 March Measure "necessarily implies" such a unilateral determination, and concluded that this unilateral determination was "contrary to Article 23.2(a) and 21.5 of the DSU."[114/]

67. As described above, the Appellate Body should reverse the Panel's Article 23.2(a) finding because the EC never requested or argued for it,[115/] and because a measure cannot violate Article 23.2(a) by "implying" a determination within the meaning of Article 23.2(a). Inasmuch as the Panel's Article 21.5 finding relies entirely on its erroneous Article 23.2(a) finding, the Appellate Body should therefore reverse this finding as well.

III. CONCLUSION

68. For the above reasons, the United States respectfully requests that the Appellate Body:

- reverse the Panel's finding on GATT 1994 Article II.1(a) and (b), first sentence, because the Panel erroneously made this finding based not on an analysis of the 3 March Measure itself, but on an analysis of the Measure together with "the right it aims to guarantee";

- reverse the Panel's finding on DSU Article 23.2(a), because the Panel improperly relieved the EC of its burden of establishing a violation and because the Panel erred in concluding that a "determination" within the meaning of that provision may be inferred

---

113/ *See id.*, paras. 6.93-6.104.

114/ *Id.*, paras. 6.96, 6.97, 6.100, 6.104, 6.107.

115/ While the Panel did not offer this as a justification for making Article 23.2(a) findings, the fact that the EC did request an Article 21.5 finding does not excuse the EC's failure to request or argue for a finding under Article 23.2(a). As described above in connection with Article 23.1, panels may not assume that parties are making particular claims merely because those claims, if proven, may establish a violation of another provision. Parties must, at a minimum, identify and argue for the claims they are making.

from other actions, and that the 3 March Measure implied such a determination;

- reverse the Panel's finding on DSU Article 3.7, because the Panel relieved the EC of its burden of establishing a violation and because the relevant portion of that provision does not contain an obligation which the 3 March Measure could have breached.

- reverse the Panel's finding on DSU Article 21.5, because it relies on arguments not made by the EC and on its improper finding with respect to Article 23.2(a).